NO. 83677-9

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

CITY OF SEATTLE

Respondent,

v.

ROBERT MAY,

Petitioner,

PETITIONER'S SUPPLEMENTAL BRIEF

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A. IDENTITY OF PARTY

Petitioner Robert May submits this supplemental brief with the understanding this court will consider the briefs filed in the Court of Appeals together with the petition for review.

B. ISSUES

1. May was charged with violating a permanent protection order issued by the King County Superior Court pursuant to RCW 26.50. Neither the order nor the court file contained the threshold finding for a permanent order, that May was likely to resume acts of domestic violence against the petitioner or her family when the order expires. The Court of Appeals held the predicate finding need not appear on the face of the order, but failed to identify any other evidence the finding was ever made or decide whether the finding on the face of the order complied with the statute. Did the municipal court error by failing to suppress the order as inapplicable to the prosecution? If the order is not applicable, then is the evidence insufficient to support the conviction?

2. The protection order warned May that a violation of the order is a

crime under RCW 26.50 and RCW 10.31.100, but not SMC 12A.06.180. The evidence is insufficient to support a conviction for the crime of violating the provisions of a no-contact order pursuant to RCW 26.50.110(1) as found by Division II in *State v. Hogan* and *State v. Madrid*. The municipal code is broader and includes conduct which does not violate state law as interpreted in those cases. Was May denied due process when he was prosecuted under the City code without fair warning?

C. STATEMENT OF THE CASE

Petitioner May relies upon the statement of facts set forth in the briefs and petition previously submitted. The key facts that bear repeating are as follows.

Robert May was convicted under SMC 12A.08.180 of violating the restraint provisions of a domestic violence protection order issued by King County Superior Court on December 30, 1996. The order was a permanent order issued pursuant to RCW 26.50.060(2) but did not contain the specific finding required by the statute ("that the respondent is likely to resume acts of domestic violence against the petitioner or the

petitioner's family or household members or minor children when the order expires. . . ."). Rather, the order contained only the following boilerplate, conditional language.

> THIS ORDER FOR PROTECTION IS PERMANENT. ✓
> ***If*** the duration of this order exceeds one year, the court finds that an order of *less than one year* will be insufficient to prevent further acts of domestic violence. CP 133.

A search of the superior court file --when finally located– did not turn up any other evidence that the threshold finding was made when the superior court issued the permanent order. CP 41-42, 151.

May challenged the applicability of the predicate protection order. He asserted the superior court did not comply with the statute authorizing the issuance of a permanent order because the finding required for an order exceeding one year was not made. The municipal court rejected the challenge. The municipal court then found May guilty of two counts of violation of a domestic violence protection order under SMC 12A.06.180 on stipulated facts. CP 56, 59-60. The court found that May violated the order on March 11, 2005 by leaving a phone message for the protected

party and on March 24, 2005 by emailing her. CP 59-60.

May appealed his conviction. The King County Superior Court reversed, holding the order was inapplicable because the finding on the face of the order did not satisfy the statutory prerequisite for issuance of a permanent order. CP 98. The superior court did not reach the other issue raised by May on appeal: whether he was denied due process because the warning on the face of the protection order did not inform him that he could be prosecuted under the Seattle Municipal Code which is broader than the state law, RCW 26.50.

The City sought review in the Court of Appeals. That Court held "the order did not have to contain the issuing court's finding on which it based its determination to make the protection order permanent." Seattle v. May, 151 Wn.App. 694, 698, 213 P.3d 945 (2009). But the court failed to identify any evidence that the finding was ever made or decide whether the finding on the face of the order satisfied the statutory prerequisite for issuance of a permanent order. The Court of Appeals rejected May's due

process claim because, in it's opinion, the statute law and City ordinance are comparable. May, 151 Wn.App. at 699, citing State v. Bunker, 144 Wn.App. 407, 416, 183 P.3d 1086, *review granted*, 165 Wn.2d 1003 (2008) (No. 81921-2), *oral argument heard February 23, 2010, decision pending.*

D. ARGUMENT & AUTHORITY

1. The Protection Order Was Not Applicable Because The Order Was Not Issued In Compliance With The Governing Statute. The Issuing Court Failed to Make the Threshold Finding Required By RCW 26.50.060(2) For Issuance Of A Permanent Order Restraining May From Contact With His Minor Son.

a. The finding on the face of the order is the only finding made by the issuing court in support of the permanent order.

The permanent protection order in dispute here cannot support May's conviction because the issuing court did not make the threshold finding required by RCW 26.50.060(2). Where the protection order restricts respondent's access to his or her minor children, the order cannot exceed one year unless the issuing court finds the respondent is likely to resume acts of domestic violence when the order expires. RCW

26.50.060(2). The only evidence of any such finding is contained in the boilerplate language on the face of the order and does not satisfy the statutory requirement.

Below, the City properly conceded "[t]he findings themselves must of course be made . . . ", but asserted the threshold finding is not required to be on the face of the order and such findings need not mirror the statutory language. Brief of Appellant at 3-4. The Court of Appeals accepted the City's position, holding that the threshold finding need not appear on the face of the order. City of Seattle v. May, 151 Wn.App. 694, 698, 213 P.3d 945 (2009). But the court failed to acknowledge there was no record –apart from the face of the order– that the superior court ever made the necessary finding. The Court of Appeals failed to address whether the ***only*** finding made –the boilerplate on the face of the order– complies with the statute.

b. The court issuing the permanent order failed to make the threshold finding required by RCW 26.50.060(2).

As explained in the briefs submitted below, the King County Superior Court correctly ruled the language on the order did not satisfy the threshold finding for issuance of a permanent order. That decision is supported and controlled by *State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (2005)* and the plain language of RCW 26.50.060(2). The municipal court erred in ruling that the language on the face of the order satisfied the statutory prerequisite for the issuance of a permanent order. The City and the trial court claimed this language was found to be sufficient in *Spence v. Kaminski, 103 Wn.App. 324, 12 P.3d 1030 (2000).* That reliance was misplaced as explained in May's petition and brief submitted to the Court of Appeals.

In the Court of Appeals, the City also argued that court should depart from the recent and well reasoned holding in *Miller*. The City urged the court to hold that substantial compliance would suffice. Reply Brief of Appellant/Cross-Respondent at 15-18. None of the authorities the City cites for this proposition involve the issuance of

protection orders. None of these cases is even analogous to the case at bar and have no persuasive authority. Rather these cases were decided according to the governing statute or applicable rule; there is no over-arching theory of substantial compliance which helps to resolve the question before this court. *See* State v. Tingdale, 117 Wn.2d 595, 602-03, 817 P.2d 850 (1991) (systematic exclusion of potential jurors based solely on clerk's knowledge of their acquaintance with defendant was a material departure from the jury selection statute and presumptively prejudicial); Continental Sports Corp. v. Dept. Labor & Industries, 128 Wn.2d 594, 910 P.2d 1284 (1996) (addressed whether delivery of notice of appeal by a private delivery service substantially complied with the statute governing appeals from order of assessment).

A bit closer to the mark, but equally unpersuasive, is the City's related argument that "[a] misstatement of the law or an omission does not support judicial relief absent a showing of prejudice." Brief of Appellant/Cross-Respondent at 17. But again the authorities relied

upon were decided in the context of a particular statute and well-developed case law dependent upon the statutory language and purpose of the law. *See* Grewal v. Dept. of Licensing, 108 Wn.app. 815, 33 P.3d 94 (2001) (implied consent warnings given accurately provided the driver with information and the opportunity to make a knowing and intelligent decision whether to submit to the breath test); State v. Hopper, 118 Wn.2d 151, 159-60, 822 P.2d 775 (1992) (Well established case law and the court rule state that error in the citation or its omission from the complaint is not grounds for dismissal absent prejudice); State v. Storhoff, 133 Wn.2d 523, 946 P.2d 783 (1997) (notices incorrectly stating the time in which to request a hearing to contest a license revocation did not violate due process because defendants were not denied an opportunity to be heard).

The foregoing cases all address notice provided for a particular purpose. The finding at issue here serves an entirely different purpose. It does not involve notice to the respondent. Rather, the statute requires the

judge to make a specific factual finding before the court has the authority to issue an order exceeding one year. Finally, the City fails to explain how the finding that appears on the face of the order complies with the statutory by any standard. The City did not respond to the substantive arguments presented in May's brief. Brief of Respondent/Cross-Appellant at 14-22 Rather, the City merely asserted, "The Order complied with everything that was required in the statute. And the finding as written on the Order were essentially the same as those required by the statute." Brief of Appellant/Cross-Respondent at 18. This is no answer to the defective language on the face of the order.

In sum, the permanent order in this case is not applicable because the issuing court failed to comply with the governing statute. This is exactly the type of defect that *Miller* identified as rendering the protection order inapplicable for purposes of criminal prosecution.

B. May Was Denied Due Process Because He Was Only Given Notice That A Violation Of the Order Is A Crime Under State

Law. Where the Charged Conduct Did Not Constitute A Violation Of State Law And May Was Not Given Notice That A Violation Could Be Prosecuted Under The City Code, The Prosecution Violated Due Process.

1. May was affirmatively mislead by the warnings that limited prosecution of violation of the order to RCW 26.50.

As explained in the briefs already submitted to this court, May was denied due process because the protection order warned him only that he could be criminally prosecuted under RCW 26.50. He was not informed that he could be prosecuted under the Seattle Municipal Code, SMC 12A.06.180. The municipal ordinance is broader than the state law was found to be in *State v. Hogan, 145 Wn.App. 210, 192 P.3d 915 (Div. II 2008) and State v. Madrid, 145 Wh.App. 106, 192 P.3d 909 (Div. II 2008).* *Cf.* State v. Bunker, 144 Wn.App. 407, 183 P.3d 1086 (2008), *decision on review pending.* The Seattle Municipal Code differs from RCW 26.50.110(1) in one important aspect. It does not contain the limiting phrase "for which an arrest is required under RCW 10.31.100(2)." This

is the phrase that spawned the controversy pending before this court in *Bunker*. Without this limiting language, the City code criminalizes a broader range of conduct than the state law and would arguably encompass May's conduct. But under state law he is not guilty. Thus, the warning was affirmatively misleading and insufficient to provide May with notice of prohibited contacts. *See* State v. Wilson, 117 Wn.App. 1, 12-15, 75 P.3d 573 (2003) *and* State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008).

Below, the City responded by arguing the order need not "list all the jurisdictions where defendant could be charged with a crime did not mean he was not informed of what conduct was criminalized under the statute." Brief of Appellant/Cross-Respondent at 19, 20. The City mistakes the place of prosecution with the conduct subject to prosecution. May argues he must be given notice of the law under which he can be prosecuted; not what jurisdiction may prosecute him. RCW 26.50 is a state law that may be enforced in many different courts of limited

jurisdiction and superior courts across the state. May was warned that his conduct would be tested by RCW 26.50. But he was never told that he could be prosecuted for violating the broader, peculiar criminal code adopted by the City of Seattle. *See* Minor, 162 Wn.2d at 803-04 (predicate offense court's failure to provide any information about the resulting firearms restriction played into the court's rejection of due process claim in *State v. Carter, 127 Wn.App. 713 (2005)*). The prejudice to May is obvious; his conduct in this case was not a crime under the proper interpretation of the state law, but was proscribed by the City code.

b. RCW 26.50.110(1) does not proscribe the contact in this case.

RCW 26.50.110 provides:

> Whenever an order is granted under this chapter . . . and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, work place, school, or day care, or of a

provision prohibiting a person from knowingly coming within or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, ***for which an arrest is required under RCW 10.31.100(2)(a) or (b)***, is a gross misdemeanor except as provided in subsections (4) and (5) of this section. (Emphasis added).

The statute incorporates RCW 10.31.100 to define the types of violations that are criminally punishable. A violation is a crime only it is of the kind "for which an arrest is required under RCW 10.31.100(2)(a) or (b)." RCW 26.50.110(1). Other conduct in violation of the order, for which arrest is not required, may be contempt of court but is not a crime. RCW 26.50.110(3). It is, therefore, necessary to examine RCW 10.31.100 to determine the scope of the crime intended by the Legislature. Subsection (2)(b) of that statute applies only to foreign protection orders

and does not apply here. RCW 10.31.100(2)(b). Subsection (2)(a) requires arrest only if a person has violated the terms of the order restraining the person "from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person. . ." RCW 10.31.100(2)(a). The last part of subsection (2)(a), referring only to orders issued under RCW 26.44.063, does not apply here. Therefore, arrest is not required, and violation of the order is not a crime, unless the violation involves (1) acts or threats of violence or (2) entering or remaining in a prohibited location. Id. Other conduct such as electronic contact by email or phone, though it may violate the order and subject the actor to sanctions for contempt, is not a crime under RCW 26.50.110(1).

This conclusion is clear from the plain language of the statute, and

no statutory construction or legislative intent analysis is necessary. State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). The purpose of statutory construction is to give effect to the intent of the Legislature, but when the plain language of a statute is clear, the court assumes the Legislature meant exactly what it said. Azpitarte, 140 Wn.2d at 141. If further analysis is necessary, the above interpretation comports with the last antecedent rule, the rule of lenity, and the Legislature's clear intent.

Under the last antecedent rule, the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" in RCW 26.50.110 modifies the entire sentence, not merely the last phrase, because the qualifying phrase is preceded by a comma. The presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006).

Moreover, if the court finds the statute ambiguous, it must be

construed in favor of criminal defendants under the rule of lenity. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). "A penal statute which may be construed to render an act either criminal or innocent will be strictly construed against the state in favor of innocence." State v. Anderson, 61 Wash. 674, 112 P. 931 (1911) (invoking the last antecedent rule and the rule of lenity to reverse the defendant's conviction).

The history of the 2000 amendments to RCW 26.50.110 also shows the Legislature intended this interpretation. The original Senate bill did not include the "for which arrest is required" language. SB 6400, 56th Leg., Reg. Sess. (Wash. 2000). That language was added by the House of Representatives. E2SSB 6400, 56th Leg., Reg. Sess. (Wash. 2000). The House Bill Report explains, "[L]anguage was added to protect people accused of violating court orders by defining that a violation is a violation if and only if someone knowingly comes within or knowingly remains a specified distance from a prohibited place or person." H.B. Rep. on E2SSB 6400, 56th Leg., Reg. Sess. (Wash. 2000). Moreover, the

testimony against the bill states the concern that this bill would criminalize every violation, but then notes that concern was addressed by the House striker to the Senate bill. Id. This history demonstrates the Legislature's intent that not all violations of a no-contact order would be criminal.

Thus, violations of a no-contact order are not criminal unless the violation involves acts or threats of violence or entering or remaining in a prohibited area. See RCW 26.50.110; RCW 10.31.200(a). Contact such as a mere phone call, without more, may violate the terms of the order, but does not constitute a crime.

The City urged the contrary view, relying primarily upon the Court of Appeals decision in *Bunker*, which is now before this court on review. In particular, the City relies upon the 2007 amendment to the statute to argue that the Legislature had always meant to criminalize all violations of a domestic violence protection order. Brief of Appellant/Cross-Respondent at 22-23. The court's analysis is incorrect and the City's reliance on that analysis is misplaced.

c. *Bunker* conflicts with the authority in *Lilyblad* and *Elmore*.

In *Bunker*, the court interpreted RCW 26.50.110(1) in a manner that renders superfluous the provision's reference to RCW 10.31.100(2)(a) & (b). Specifically, the court rejected the State's invitation to simply ignore the "for which an arrest is required" language in favor of concluding that it applies only to the immediately preceding two clauses, which involve specific geographic restrictions identified in the order and foreign protection orders indicating violation will be a crime.

But under the court's reasoning, there is no need for RCW 26.50.110(1) to reference RCW 10.31.100(2) to identify which order violations will be criminal because, according to the court, all violations are criminal. As such, *Bunker's* interpretation renders the reference to RCW 10.31.100(2) in RCW 26.50.110(1) superfluous. This conflicts with *State v. Lilyblad, 163 Wn.2d 1, 10, 177 P.3d 686 (2008)*, in which this Court recently held that an appellate court "may not interpret any part of a statute as meaningless or superfluous."

Moreover, the court relied on the legislative history of the 2007

amendments to the statute, which deleted the "for which and arrest is required" language. It is true the legislature claimed the amendment was not intended to change the substantive terms of RCW 26.50.110, and that the reason for the amendment was to make clear it had always intended all willful violations to be criminal. But no clarification was necessary because there was no ambiguity and therefore the amendment did substantively change the law. Therefore, the *Bunker* court erred in applying the 2007 version of RCW 26.50.110(1) to the cases at bar. Its decision to do so conflict with this Court's decision in *In re Elmore, 162 Wn.2d 27, 168 P.3d 1285 (2007).*

In *Elmore*, this Court addressed whether amendments to RCW 71.09.090, purporting to clarify when persons involuntarily committed as sexually violent predators were entitled to a new commitment trial, were retroactive. While there is a presumption against retroactive application of statutory amendments, but this presumption may be overcome by showing:

(1) the legislature intended to apply the amendment retroactively,

> (2) the amendment is curative and "clarifies or technically corrects ambiguous statutory language," or (3) the amendment is remedial in nature. Barstad v. Stewart Title Guar. Co., 145 Wn2d 528, 536-37, 39 P.3d 984 (2002) . . .A court may only consider an amendment curative and remedial if the amendment "clarifies ... an ambiguous statute without changing prior case law constructions of the statute."

162 Wn.2d at 35-36 (emphasis added). As discussed above, the pre-2007 version of RCW 26.50.110 was not ambiguous when properly read by applying common rules of grammar. Without an ambiguity, the 2007 amendment to RCW 26.50.110 should not apply.

E. CONCLUSION

For the reasons stated above, this court should reverse May's conviction and remand for dismissal.

Respectfully submitted this 5h day of April, 2010,

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